IN THE COURT OF APPEALS OF IOWA

No. 0-424 / 09-1207
Filed July 28, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN HOWARD RAI,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Jonathan Rai appeals his convictions on two counts of sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Ralph Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Jonathan Rai appeals following his convictions and sentencing on two counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (2007). Rai contends a new trial should be ordered because he received ineffective assistance of counsel when his trial attorney failed to object to prosecutorial misconduct. Although we agree prosecutorial misconduct occurred in certain respects, the evidence against Rai was strong. Accordingly, we hold Rai was not prejudiced by the misconduct and therefore affirm.

I. Background Facts and Proceedings.

The jury trial revealed the following facts: In February 2006, Rai married Michelle, and they lived together in Dubuque. Michelle had a son from a previous marriage, M.B., who was born in 2001. Michelle's sister, Lisa, had a daughter, H.B., who was born in 2002. Michelle's mother, Renee, and stepfather, William, also lived in Dubuque. In the summer of 2007, Lisa and her children moved to Dubuque to live with Renee and William while Lisa's husband was deployed to Iraq.

On December 25, 2007, Rai, Michelle, Lisa, the children, and a few family friends gathered at Renee and William's house for Christmas dinner and gift opening. The family planned to get together again at Renee and William's house on New Year's Day. However, according to Lisa, early in the morning on New Year's Day 2008, H.B. asked her if she could stop Rai from coming to the gathering because Rai had been touching H.B. on her private parts, including some touching that had occurred on Christmas Day.

Lisa testified she then called Michelle and asked her to go out with her for coffee. As she drove Michelle around, Lisa told Michelle about H.B.'s allegations. Michelle testified that upon hearing of these charges, she was "furious" and "panicked." Michelle related to Lisa two suspicious incidents involving Rai and M.B. that had occurred between Christmas Day 2007 and New Year's Day 2008.

According to Michelle, the first incident took place when Rai was helping M.B. get dressed. Michelle testified that when she walked into the room, she noticed Rai had an erection as he was sliding up M.B.'s underwear. According to Michelle, the incident was "real quick," and "it was gone" when Rai stood up, grabbed his socks, and adjusted himself.

The second incident happened a day or two later when Rai got up early to watch M.B. because Michelle was not feeling well. Michelle testified that she could hear Rai and M.B. playing at first, but then it got quiet and their dog began whimpering outside M.B.'s bedroom door. Concerned about the silence, Michelle went to M.B.'s room and quickly opened the door. According to Michelle, she saw Rai and M.B. "staring at [her] like a deer with headlights" while they were lying facing each other on the dog bed. Michelle then saw Rai's hand "move slowly away on the—on the ground, which would have been by [M.B.'s] private area." Michelle also noticed M.B. had an erection. When Michelle questioned what they were doing, they said they were looking for dinosaur bones. Michelle said "it didn't look like that" and asked if Rai was touching M.B. Rai denied any inappropriate touching. When Michelle asked M.B. in private if Rai had ever

touched his pee-pee, Michelle testified that M.B. first asked if Rai would get in trouble and then denied Rai had touched his private parts.

After Michelle and Lisa spoke with each other while riding in the car together on New Year's Day, they returned to Michelle and Rai's house, but Rai and M.B. had already left for the family gathering. Therefore, Michelle and Lisa drove on to Renee and William's house, where the rest of the family had already assembled.

Michelle and Lisa took H.B. and M.B. to a room on the second floor and asked them about the sexual abuse. According to the two women, H.B. repeated what she had told Lisa earlier, but M.B. got upset, denied any abuse, and called H.B. a liar. H.B. then exited the room, leaving Michelle and Lisa to question M.B. privately. Michelle testified that during the questioning, M.B. was embarrassed and scared, and Lisa testified that M.B. "was a nervous wreck" and "scared to death." According to Lisa, the questioning stopped when M.B. urinated on Lisa's lap.

After Michelle and Lisa interviewed H.B. and M.B., the two women went to confront Rai. William was asked to join the session as a "witness." Michelle asked Rai if he had something to tell her. According to Michelle, Rai eventually "admitted that he had been molesting [M.B.] and [she] believe[d] [H.B.] was included." Lisa testified that Rai ultimately admitted he had been molesting M.B. and had looked at H.B.'s vagina because "he wanted to know what a little girl's vagina looked like" since "the anatomy books only show you so much." William also testified that Rai said he had looked at H.B.'s vagina to "know what a little

girl looks like" and had been touching M.B. on the "pee-pee and the rearend" to help M.B. go to the bathroom.

Michelle then asked Rai to call his mother, Anita, to tell her what he had done. According to Michelle and Lisa, Rai admitted to Anita he had been molesting M.B. and H.B. Anita's version of this conversation, when she testified for Rai's defense, partially confirmed the sisters' testimony. Anita testified, "He [Rai] told me that he had molested [H.B.] and [M.B.], but that came out wrong." Anita added that Rai explained on Christmas Day, he went downstairs with H.B. to help her find a toy, and H.B. took "the zipper [of her pajamas] and zipped it all the way down from the top of her neck all the way down to her foot and exposed herself, her lower regions."

After Rai had spoken on the phone with his mother, Michelle and Lisa left the room. William testified that Rai then admitted, "I'm sorry if I disappointed you." William added that Rai offered an explanation that Michelle was no longer satisfying his sexual needs to "keep him nice and calm."

Lisa then called the local police, who arrived shortly after to take statements. Subsequently, the Iowa Department of Human Services (DHS) was contacted. As part of the DHS investigation, M.B. and H.B. were medically examined and interviewed at St. Luke's Hospital Child Protection Center on January 4, 2008.

M.B.'s medical examination revealed no signs of injury. H.B.'s medical examination found superficial tears, which could be consistent with sexual abuse but also could be caused by other events such as wiping, scratching, or constipation. However, the doctor who examined M.B. and H.B. testified that it is

rare to find injuries to the genital or anal area, especially in boys, and they "rarely see injuries in children."

During M.B.'s interview with the Child Protection Center's counselor on January 4, 2008, he did not disclose any sexual abuse by Rai. However, H.B. reported sexual abuse in an interview with the same counselor on the same day. Both interviews were recorded. Portions of the recordings were shown during trial, and the jury was given access to the recordings in their entirety during deliberations. During her interview, H.B. said Rai had taken her in the bathroom at Renee and William's house, unzipped her pajamas, and rubbed the skin of her "private" with his hand. H.B. also disclosed that Rai had exposed his "private part" to her in her room at Renee and William's house and "asked [her] if [she] wanted to lick it." H.B. also said Rai had again rubbed the skin of her private in the basement of Renee and William's house. Finally, H.B. said Rai had taken her hand and put it on M.B.'s private while under M.B.'s bed in M.B.'s house. During all of these incidents, H.B. was five years old.

A few days later, Rai and his attorney contacted the Dubuque Law Enforcement Center and volunteered to be interviewed. Rai told Officer Digman that he regularly held M.B.'s penis and rubbed M.B.'s back above his buttocks to help him urinate, picked cotton towel fuzz off of M.B.'s penis area, and applied ointment around M.B.'s buttocks and penis to cure his diaper rash. Officer Digman testified that Rai "sternly stated" he did not put his finger in M.B.'s buttocks after Officer Digman asked Rai where he usually wiped M.B.'s buttocks and applied ointment. Rai also denied making any incriminatory statements to Michelle, Lisa, and William on New Year's Day 2008 concerning H.B. and M.B.,

saying he only told them he had touched M.B. by applying ointment to his penis and around his anus.

On April 14, 2008, the State filed a trial information charging Rai with second-degree sexual abuse in relation to H.B. Rai pled not guilty. He posted bond and remained free pending trial.

At this point, Michelle provided a letter and taped statement to Rai's attorney in support of Rai's defense. Michelle later testified she was trying to protect her husband because she wanted to believe he was innocent. Michelle's letter and statement alleged explicit sexual behavior involving Lisa, H.B., and Michelle's ex-husband, in attempt to demonstrate H.B. was lying about Rai and had actually been exposed to sexual activity by her mother and Michelle's ex-husband.

Not surprisingly, there was considerable tension between Michelle and Lisa at this time. DHS removed M.B. from Michelle's care because of Rai's continued presence in the household. The boy was placed with his father, Chris. However, when Chris was charged in August 2008 with child endangerment for driving while under the influence of alcohol with M.B. in the car, M.B. was removed from his custody and put in the custody of Renee and William.

After M.B. came to live with Renee and William, Renee decided to ask M.B. if Rai had ever touched him "down here" inappropriately, pointing to his private parts. M.B. admitted H.B. had been telling the truth. Renee then called Michelle. According to Michelle, M.B. told her he had not disclosed the abuse before because Rai had told him not to. At this point, Michelle ordered Rai out of

the house and called the police. M.B. returned to Cedar Rapids with Renee for another interview with St. Luke's Child Protection Center on October 1, 2008.

During M.B.'s second interview with the Child Protection Center counselor, M.B. acknowledged Rai's sexual abuse. This interview was also recorded with portions played for the jury and the entire DVD available during deliberations. M.B. revealed to the counselor that Rai sucked on M.B.'s "pee-pee" twice in M.B.'s bedroom and once in the attic at Michelle's house, touched M.B.'s pee-pee with his hands, and made M.B. suck on his pee-pee until "milk stuff" came out. M.B. also disclosed that Rai put light blue "stuff" on his finger and then put his finger "through [M.B.'s] butt" while in M.B.'s bedroom.[1] Finally, M.B. said Rai touched H.B. on her private parts while they were under M.B.'s bed, but denied that Rai made him and H.B. touch each other. M.B. also reported that Rai told H.B. and him not to tell. M.B. added, "Now I'm brave and told everything that [Rai] did." M.B. was seven during the second interview and six at the time of the reported sexual abuse.

On December 29, 2008, the State filed a separate charge of second-degree sexual abuse for the alleged abuse on M.B. Rai again pled not guilty. On February 18, 2009, the two cases were consolidated for trial.

Trial to the jury commenced on March 30, 2009. H.B. and M.B. testified and generally restated their prior reports of Rai's sexual abuse. H.B. testified that Rai took her into the bathroom, pulled down her pajamas, and touched her on the "front" part of her body "that [she does not] like him to touch." H.B. also

[1] Michelle testified at trial that she and Rai used a blue bottle as a lubricant during anal sex but this was "personal between Jon and I" and the information had never been shared with anyone.

testified that Rai "pulled down his pants" and said, "Don't you want to touch it?" M.B.'s trial testimony was not as detailed as his second interview with the counselor, but M.B. did tell the jury that Rai touched his "pee-pee" with "his finger" and that Rai made him "suck on [Rai's pee-pee]" until "white stuff" came out. M.B. further acknowledged the blue substance by saying, "It was like, I don't know, it's stuff." Michelle, Lisa, Renee, William, Anita, the counselor and physician from the Child Protection Center, and Officer Digman also testified.

While questioning Officer Digman, the prosecutor elicited testimony regarding Rai's decision to conduct the police interview while accompanied by his attorney. The prosecutor wrapped up her questioning of Officer Digman as follows:

> Q. And Mr. Rai's lawyer was in there with him the whole time? A. That's correct.
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> . . . .
>
> Q. Okay. And in the course of your training and experience, what would you consider to be—would you consider it to be a red flag to have an attorney and a defendant contact you at the beginning of an investigation and want to come in and talk? A. Yes.
>
> Q. Why? A. Normally in an investigation, I want to get all the facts I can, talk to the parents that are involved first, the mothers, and I knew in this particular case the mother had talked to the sister, based on the officer or patrolman's report, and that the grandmother and grandfather were also involved, and all four of those people would have been quite important to have talked to prior to. And prior to the interview with [Rai], the only interviews that I had to go off of was the patrolman's interviews of Lisa and Michelle.
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> . . . .
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> Q. And based on your training and experience, how valuable are interviews that are generated by the defendant and his attorney when they call you and say, We want to come in and talk? A. I believe they're valuable.
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> Q. And why are they valuable? A. He basically wants me to know what his story is, or what he wants me to believe is going on in the investigation.

> Q. So in terms of the process. You would never turn one down. Is that correct? A. That's correct.
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> Q. Because it's just as valuable to know what they want you to know than it is to know the truth? A. That's correct.
>
> Q. And what about this particular interview when it was over, in looking back on it, was a red flag for you? A. Following the other interviews that I did?
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> Q. Correct. A. It was quite obvious that he wanted me to have several reasons as to why he may have been touching [M.B], where he was touching him, the excuses as to why he was touching him in the places that he did, leaving himself basically alibis as to why he was doing what he was doing with [M.B.]

The prosecutor had also asked Officer Digman earlier, "[D]id you sense that you were being played?" Officer Digman replied, "Yes."

During her closing argument, the prosecutor referred back to Officer Digman's testimony. She suggested Rai's decision to have counsel present during his interview with police meant he was hiding something. Her argument proceeded as follows:

> And [Officer Digman] gets a phone call or he calls Mr. Rai, and Mr. Rai says, I'm coming in, with my lawyer. Well, Clue Number One. Because there's two things that are going to happen. Mr. Rai is going to come in with his lawyer and he's going to tell the truth, or Mr. Rai's going to come in with his lawyer and tell the policeman what he wants the policeman to believe is the truth.
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> Lieutenant Digman didn't just fall off the potato wagon, okay. He knew he was being played. He knew what was going on. He knew that when Jon Rai came in with his attorney and said, Well, yeah. Okay. I might have touched his penis, but we've got really fuzzy towels and they leave a lot of lint, so I had to pick a piece of lint off his penis. And oh, by the way, he has rashes, and I had to put A&D ointment on him. And oh, by the way, I might have touched him on this part putting another lotion on him. And oh, by the way, I had to take a thread off his penis one day. But gosh, I'm sorry, but that accounts for all of the touching, so see you later. Let's everybody just shake hands and we're all going home.
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> And Lieutenant Digman, because he is a good police officer, saw right through that, took that little nugget for what it was worth, and said, Sorry, Charlie. I am not going to walk away. I am not going to believe that nonsense. And if you've gone to all the effort to get your lawyer to come in here to tell me this, then maybe you

> got something to hide. And I'm not going home, and we're going to finish this investigation and we're going to see it out to the end. And sometimes that happens with police. And in this case, it did.

At the outset of her closing argument, the prosecutor also referred to herself pointedly as the advocate and voice for the children. She stated the following:

> We're going to do justice for [M.B.] and we're going to do justice for [H.B.]. . . . Because we have the luxury of speaking for the children. We have the luxury of coming to advocate for the children. We have the luxury of being able to talk to a jury on behalf of the children. We are their voice.
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> . . . .
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> But I do ask that you not hold what you feel about me against the State, because if we are going to do justice, for the children, if we are going to do justice for the little ones, who are unfortunately sometimes unprotected, then we have to be loud, we have to be direct, we have to say ugly things because we are their voice.

In her rebuttal argument, the prosecutor returned to this theme. She first opened her rebuttal with an emotional reference to a "special place in hell," asserting:

> There is no question that there is a special place in hell for mothers who do not believe their children when their children come to them to say they have been sexually abused. There is no doubt. That is the worst kind of betrayal a mom can do to a child. But today, and this week, is not about Michelle['s] bad, bad mothering. This is about the part of Michelle['s] bad, bad mothering that let her child be sexually abused by the Defendant.

She then closed her rebuttal with a plea that the jury "validate" what the children had done by appearing and testifying:

> Those kids deserve a voice. They deserve validation for coming in here and telling you what [Rai] did to them. Thank you.

On April 6, 2009, the jury found Rai guilty of both charges of second-degree sexual abuse. On August 7, 2009, the district court sentenced Rai to an

indeterminate term of imprisonment not to exceed twenty-five years with a seventy percent minimum on each count, with the sentences to run consecutively. The court ordered Rai to submit a DNA sample, have no contact with the victims, and register with the sex offender registry. The court also imposed a special sentence of lifetime parole pursuant to Iowa Code section 903B.

Rai now appeals, alleging ineffective assistance of trial counsel. Rai specifically complains about his trial counsel's failure to object either to the prosecutor's references during questioning to Rai's use of an attorney or to the prosecutor's closing argument.

II. Scope and Standard of Review.

To have an ineffective assistance of counsel claim resolved on direct appeal, the defendant must "establish an adequate record to allow the appellate court to address the issue." *State v. Johnson*, ___ N.W.2d ___, ___ (Iowa 2010). We will then resolve the claim on direct appeal if we determine the record is adequate. *Id.* However, if we determine the record is inadequate, we will preserve the claim for postconviction proceedings. *Id.* Since the record is adequate in this case, we will resolve Rai's claim on direct appeal.

When considering ineffective assistance of counsel claims, "we make an independent evaluation of the totality of the relevant circumstances" because such claims are based on the constitutional right to a fair trial. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). This is equivalent to a de novo review. *Id.*

III. Discussion.

To succeed on an ineffective assistance of counsel claim, the defendant must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The defendant must prove both elements by a preponderance of the evidence. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). If the defendant is unable to do so, the ineffective assistance of counsel challenge should be denied. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). The main concern is the fundamental fairness of the challenged proceeding. *Risdal*, 404 N.W.2d at 131.

To satisfy the first element, the defendant must overcome the presumption that counsel fell within the wide range of reasonable professional assistance. *Graves*, 668 N.W.2d at 881. Counsel's performance is measured by prevailing professional norms. *Id.*

For counsel to breach an essential duty, the objection that counsel failed to make must have been meritorious. *Id.* at 869. When the defendant alleges ineffective assistance of counsel for failure to object to prosecutorial misconduct, there must be a valid claim of prosecutorial misconduct. *Id.* To establish a meritorious prosecutorial misconduct claim, the defendant must show both misconduct and "proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *Id*. Prejudice in this context requires the court to consider:

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures and; (5) the extent to which the defense invited the misconduct.

Id. (citations omitted).

Additionally, to establish prejudice for ineffective assistance purposes, the defendant must show "a reasonable probability the outcome of the trial would have been different had trial counsel performed competently." *Id*. at 870. Thus, if the asserted ineffective assistance relates to a failure to object to prosecutorial misconduct, "prejudice" seemingly enters into the calculus twice—first, in deciding whether prosecutorial misconduct occurred, and, second, in determining whether the defendant was prejudiced by it for ineffective assistance purposes. *Id*. at 869-70. In *State v. Boggs*, 741 N.W.2d 492 (Iowa 2007), however, the supreme court seemingly merged the two inquiries into one, emphasizing that "[t]he most important factor is the strength of the State's case against the defendant." *Boggs*, 741 N.W.2d at 509.

A. Prosecutorial Misconduct.

We conclude the prosecutor acted improperly when she elicited testimony and presented argument about Rai's decision to have an attorney accompany him during his pre-arrest interview with police. The references to an attorney were not merely in passing but were meant to disparage Rai's credibility and imply that he had something to hide because he did not appear unrepresented. For example, when examining Officer Digman, the prosecutor asked, "[W]ould you consider it to be a red flag to have an attorney and a defendant contact you at the beginning of an investigation and want to come in and talk?" Later, in closing argument, the prosecutor asked the jury to consider, "And if you've gone to all the effort to get your lawyer to come in here to tell me this, then maybe you got something to hide."

Our supreme court has found that

> the court should not penalize [a defendant] by allowing the State to show the presence of the lawyers when such evidence could have no purpose other than to raise an inference of guilt in the jurors' minds. As a matter of public policy, neither trial court rulings nor our decisions should unnecessarily discourage lay persons from seeking advice and assistance of counsel in important and serious legal procedures.

State v. Nelson, 234 N.W.2d 368, 373 (Iowa 1975). In *Nelson*, the defendant's conviction was reversed because, among other things, the trial court had permitted testimony that the defendant's attorney and another lawyer were present during the execution of a search warrant at the defendant's residence. *Id.* at 372. Although the court did not need to reach whether a defendant's privilege to have a lawyer present during the execution of a search warrant amounted to a constitutionally protected right to counsel, it did find that a defendant cannot be penalized for retaining counsel. *Id.* at 372-73.

The *Nelson* holding is in line with decisions of other jurisdictions. The Third Circuit has found that a defendant's Sixth Amendment right to counsel is violated when a prosecutor asks the jury during closing arguments if an innocent man would have consulted with an attorney the day after a murder. *U.S. ex rel. Macon v. Yeager*, 476 F.2d 613, 615-16 (3rd Cir. 1973). The Ninth Circuit has found that a defendant's due process right to a fair trial under the Fourteenth Amendment is violated when a prosecutor suggests the defendant's retention of an attorney is probative of guilt. *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983). Furthermore, the Connecticut Supreme Court has found that a prosecutor violates a defendant's due process right to a fair trial by referencing the defendant's pre-arrest decision to contact an attorney in an effort to

encourage the jury to infer the defendant's guilt from that act. *State v. Angel T.*, 973 A.2d 1207, 1220-21 (Conn. 2009).

In short, the prosecutor's comments on Rai's decision to have counsel attend his pre-arrest interview with Officer Digman were clearly improper. Helpfully, the State has now conceded in its appellate brief that "the manner in which the prosecutor asked questions and presented argument about the defendant's decision to have counsel accompany him during his police interview was inappropriate."

We also conclude the prosecutor acted improperly and unprofessionally when she invited the jury panel to join her in becoming the advocate and voice for the children. A prosecutor has a duty both to vigorously represent the State and to ensure the defendant receives a fair trial by complying with due process requirements. *Graves*, 668 N.W.2d at 870. A prosecutor's primary interest should not be to obtain a conviction, but to see that justice is served. *Id*. Although a prosecutor is given latitude during closing arguments to analyze the admitted evidence, he or she may not suggest that the jury decide the case on any ground other than the weight of the evidence. *Id.* at 874. The prosecutor's comments cannot contain improper emotional appeals "designed to persuade the jury to decide the case on issues other than the facts before it." *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa Ct. App. 1995).

By this standard, the prosecutor committed misconduct when she referred to herself as the advocate and voice for the children, while asking the jury to validate the children for coming forward with their stories. The prosecutor began her closing argument by stating that the State has "the luxury of being able to talk

to a jury on behalf of the children" and that the State has the luxury of being the advocate and voice for the children. Toward the end of her closing argument, the prosecutor suggested that to do justice for "the little ones," she had to be loud and "say ugly things" because the State is the voice of the children. Furthermore, the prosecutor closed her rebuttal argument by stating, "Those kids deserve a voice. They deserve validation for coming in here and telling you what [Rai] did to them." The timing of this remark compounded its unfairness: This was the prosecutor's final salvo before the jury received the case.

These comments, in some respects, were analogous to arguments the supreme court condemned in *State v. Monroe*, 236 N.W.2d 24, 30-31 (Iowa 1975), when the prosecutor urged the jury "to protect our children" from drug dealing. Here, the prosecutor essentially asked the jury to render a guilty plea as a show of support for the children. She improperly suggested her role was that of an advocate for the children. Such emotional appeals have the potential to draw the jury away from deciding the case based on the facts presented to finding Rai guilty based on their sympathy for children. To its credit, the State has conceded on appeal that "[s]ome of the prosecutor's arguments were improper."

B. Prejudice.

Although we have found that prosecutorial misconduct occurred, we must now consider the question of prejudice. As noted above, whether the defendant was prejudiced to such an extent that he or she was denied a fair trial is examined by considering five factors. *Graves*, 668 N.W.2d at 869. Prejudice exists if the application of these factors shows a reasonable probability that the

misconduct "prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *Id.* at 877. The most important factor in determining prejudice is the strength of the State's case against the defendant. *Boggs*, 741 N.W.2d at 509.

Upon our review, we conclude that Rai cannot prove his trial counsel's failure to object to the prosecutor's improper statements prejudiced him. The evidence supporting his convictions was strong. The children themselves testified in court to the abuse. Recordings of their earlier interviews were also admitted into evidence. Lisa testified to her own firsthand observations of Rai and H.B. In addition, Michelle testified to what she had seen between Rai and M.B. Her testimony was very harmful to Rai since she previously was Rai's strongest defender. Various witnesses testified to Rai's incriminating statements on New Year's Day 2008, including (most damagingly) Rai's own mother. She said, "He told me that he had molested [H.B.] and [M.B.], but that came out wrong." Also harmful to Rai's defense was M.B.'s unprompted recollection that Rai had used "blue stuff," apparently a lubricant used by Rai and Michelle for anal sex and known only to them.

Although Rai did not invite the prosecutor's misconduct, the misconduct was not so severe, pervasive, or central to the State's case as to deprive Rai of a fair trial. For the most part, this was a case built on eyewitness testimony, not prosecutorial innuendo. Furthermore, the trial judge instructed the jury that it should base its verdict only upon the evidence and instructions. The judge

explained that evidence does not include "[s]tatements, arguments, questions, and comments by the lawyers."

For the above reasons, we conclude Rai cannot show a reasonable probability that the outcome of his trial would have been different without the prosecutorial misconduct. Accordingly, while we disapprove of certain statements made and questions asked by the prosecutor, we deny Rai's ineffective assistance of counsel claim and affirm his convictions and sentencing on two counts of sexual abuse in the second degree.

AFFIRMED.